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MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1977

No. **77-445**

JOHN KENNY and ROBERT KENNY, Executors of the Estate
of JOHN J. KENNY, Decd.,

Petitioners,

vs.

LOUIS SANFILIPPO, et al.,

Respondents.

**BRIEF IN OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT.**

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JOHN KENNY and ROBERT KENNY, Executors of the Estate
of JOHN J. KENNY, Decd.,

Petitioners,

vs.

LOUIS SANFILIPPO, FRANK PRINCE, ROBERT KERN,
RENALD ROSSA, JOSEPH CICARDINI, NORMAN
HOWARD, UMBERTO GUIDOTTI, ARTHUR
TATANGELO, GORDON FLAGG, FRANK BLANDI, W.B.
SETTLE, LEO WHITE, DANIEL DUBANIEWICZ,
ADOLPH DONADEO, H.J. GUERICH and FRANCIS
KEENAN, All as Trustees ad litem of the WESTERN
PENNSYLVANIA HOTEL, CLUB, MOTEL, AND
RESTAURANT EMPLOYEES PENSION FUND, and/or
SUCCESSOR TO TRUSTEES OF THE HOTEL AND
RESTAURANT EMPLOYEES ALLIANCE LOCAL UNION
237 INSURANCE AND WELFARE TRUST FUND AND
TRUSTEES OF THE HOTEL AND RESTAURANT
EMPLOYEES ALLIANCE LOCAL UNION 237 PENSION
TRUST FUND,

and

LOUIS SANFILIPPO, FRANK PRINCE, ROBERT KERN,
RENALD ROSSA, JOSEPH CICARDINI, NORMAN

HOWARD, UMBERTO GUIDOTTI, ARTHUR TATANGELO, GORDON FLAGG, FRANK BLANDI, W.B. SETTLE, LEO WHITE, DANIEL DUBANIEWICS, NICHOLAS ALWINE, H.J. HUENRICH and FRANCES KEENAN, all as Trustees ad litem of THE WESTERN PENNSYLVANIA HOTEL, CLUB, MOTEL and RESTAURANT EMPLOYEES WELFARE FUND, and/or SUCCESSOR TO TRUSTEES OF THE HOTEL AND RESTAURANT EMPLOYEES ALLIANCE LOCAL UNION 237 INSURANCE AND WELFARE TRUST FUND AND TRUSTEES OF THE HOTEL AND RESTAURANT EMPLOYEES, ALLIANCE LOCAL UNION 237 PENSION TRUST FUND,

and

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION WELFARE FUND and WILLIAM L. MEYERS, Individually and trading as WILLIAM L. MEYERS COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ARGUMENT

The District Court's finding of fact does not raise a question for review by the Supreme Court.

This case arose out of the termination of John Kenny's employment by respondents. Kenny sued, claiming the termination was a breach of his contract. Respondents counterclaimed for monies already paid Kenny and raised various defenses to the contract including lack of consideration

and breach of fiduciary duty by Kenny. The District Court found for petitioner and the Court of Appeals affirmed.

Petitioner comes before this Court challenging the amount of damages awarded below. He acknowledges that the District Court cited the appropriate rule of law in measuring damages, but challenges its factual application (Petition p. 19).

The contract itself was for a period of five years (Petition p. 49). Petitioner had the option to renew for a second five years (Petition p. 52). In determining the damages, the District Court awarded Kenny the amount of his salary for the five-year term of the contract (Petition p. 41-42).

The District Court then concluded that Kenny, due to his age and medical condition, would not have exercised the option to renew (Petition p. 42-43). The District Court specifically referred to Kenny's own motion to advance trial wherein Kenny stated that he was 74 years of age and "suffering from hypertension and heart ailment necessitating constant cardiological care and requiring that he avoid stress" (Petition p. 43).

The District Court relied on *Russell v. Barnes Foundation* 52 F. Supp. 827 (E.D. Pa. 1943), *affd*, 143 F.2d 871 (3d Cir. 1943), *cert. denied*, 323 U.S. 771 (1944), and *Pierce v. Tennessee Coal, Iron and Railroad Company*, 173 U.S. 1 (1899) for its conclusion that for the 5 year specific term of the contract Kenny was entitled to his salary less any potential earnings (Petition p. 41-42). By doing this, Kenny "would simply recover the value of the contract to him at the time of the breach" *Pierce, supra*, at 16.

The District Court then went on to conclude that, as a question of fact, "it is not probable that Mr. Kenny would have exercised his option to renew the contract for an additional five-year term" (Petition p. 43). The factual findings of the District

Court on this question should be upheld unless "clearly erroneous" Rule 52, Federal Civil Rules. Here, as noted, there was ample support in the record for the Court's conclusion that a man in his mid-seventies, having already suffered two severe heart attacks and requiring constant medical care for hypertension and a heart ailment, would not exercise his option to work an additional five years.

In any event, whether the District Court's finding of fact is correct is of interest only to the parties in this proceeding. It raises no issue of federal law nor does it conflict with established principles of law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

s/ Robert Mozer
Attorney for Respondents